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CASE NO. 88-654

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DR. ANJALI JOSHI,

Petitioner,

v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

GERALD B. JASKI, General Counsel
Counsel of Record
LINDA C. SCHMIDT,
Associate General Counsel
FLORIDA STATE UNIVERSITY
311 Hecht House
Tallahassee, Florida 32306
(904) 644-4440

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QUESTIONS PRESENTED

I. WHETHER THE ELEVENTH CIRCUIT COURT'S CONSTRUCTION OF THE CONCEPTS OF "SUBSTANTIALLY EQUIVALENT" EMPLOYMENT AND "REASONABLE DILIGENCE" IN MITIGATING DAMAGES, AS SET FORTH IN FORD MOTOR CO. v. E.E.O.C., 458 U.S. 219 (1982), CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

II. WHETHER IT IS WITHIN THE DISCRETION OF A COURT TO DECLINE TO AWARD VARIOUS RETROACTIVE BENEFITS TO A TITLE VII PLAINTIFF WHO HAS FAILED TO MITIGATE DAMAGES.

LIST OF PARTIES

The parties to this proceeding are Dr. Anjali A. Joshi, Petitioner; and Dr. Bernard F. Sliger, in his capacity as President of Florida State University, Dr. Bobby E. Leach in his capacity as former Vice President for Student Affairs, Dr. Robert B. Kimmel, in his capacity as Acting Director, Florida State University Health Center, Dr. Homer Ooten in his capacity as former Director of Business Affairs, Dr. Robert Hunter, in his capacity as former Director of the Florida State University Health Center, and Dr. Philip Rond, in his capacity as former Director of the Florida State University Health Center.

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II. THE ELEVENTH CIRCUIT COURT'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF DISCRETION IN THIS CAUSE IN DECLINING TO GRANT PETITIONER RETROACTIVE BENEFITS, WHERE PETITIONER FAILED TO MITIGATE HER DAMAGES, DOES NOT CONSTITUTE AN ABUSE OF DISCRETION NOR DOES IT CONFLICT WITH THIS COURT'S PRIOR DECISIONS.	13
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STATEMENT OF THE CASE AND FACTS

Respondent will attempt to correct inaccuracies from the statements in Petitioner's brief.

The use of the word "other" in the following quotation may imply that lack of Petitioner's credibility was not one of the bases for the Court's rejecting Petitioner's private medical practice as a reasonable effort to mitigate damages:

> Judge Paul rejected Petitioner's private medical practice as a reasonable effort to mitigate her damages, and found her testimony concerning her other efforts was not credible.

Petitioner's brief at 3-4 (emphasis supplied). Respondent disputes any implication that lack of Petitioner's credibility was not involved in the Court's rejection of her private medical practice as a reasonable effort to

mitigate. Judge Paul found that Dr. Joshi was not a credible witness.

Regarding available substantially equivalent employment, the district court found that there were substantially equivalent full-time positions available, identified by Dr. Gwartney, that Petitioner did not pursue. Petitioner now claims that she was not qualified for the four identified emergency room positions, but the record and the findings of fact do not support this assertion. Regarding her claim that the Wakulla County clinic required residence within that county, the trial court specifically found that there were no other qualifications beyond being a licensed doctor. The Eleventh Circuit Court of Appeals affirmed the district court in rejecting Petitioner's definition of substantially equivalent employment as too narrow.

The trial court also noted that there was the additional potential of other positions available at physicians' offices and clinics that Dr. Gwartney did not check.

Regarding the assertion that Petitioner informed the University in August 1975 "that she was . . . willing to accept night and weekend duty" (Petitioner's Brief at 5), Respondent excepts.

Respondent also disputes the following statement on page 6 of Petitioner's brief: "Because her practice did not grow quickly enough to occupy her on full time basis, she supplemented her private practice by doing both part-time work and "fee-for-service" work. . . ." The alleged cause and effect relationship suggested by the first clause is contrary

to what the district court found about Petitioner's private practice: "[I]t neither was regarded as an opportunity for full-time employment, nor. . . ." Joshi v. Fla. State Univ., No. TCA 78-844 MMP, slip op. at 8, (N.D. Fla. Nov. 6, 1986)(Petitioner's Appendix at 45a). Respondent further disputes use of the conjunction "and" in the second clause to suggest that Petitioner simultaneously worked in private practice and did additional [unspecified as to nature] part-time work and "fee-for-service" work. The trial court found that the disjunctive "or" was the appropriate word to interpose between "part-time" and "fee-for-service." The trial court found that Petitioner's "private office practice was not considered a significant separate portion of her employment." Joshi, slip op. at 9,

Petitioner's Appendix at 45a (emphasis in original).

Further, Respondent vigorously objects to the statement in Petitioner's brief at 6 that "Between her private office practice and the other work she performed, Petitioner engaged in the practice of medicine on a full time basis. . . . (emphasis removed).

Here, as in the instances cited previously, Petitioner is making assertions contrary to the fact findings of the trial court based on Petitioner's discredited testimony. The same is true regarding Petitioner's list of places where she applied for work. See Joshi, slip op. at 4-6, Petitioner's Appendix at 42a-43a.

Petitioner simply was not a credible witness on the issue of mitigation of damages.

SUMMARY OF THE ARGUMENT

It is only by misstating the holding of the Eleventh Circuit that Petitioner can argue that the court's construction of the concepts of "substantially equivalent" employment and "reasonable diligence" in mitigating damages conflicts with decisions of other circuits. The court's actual holding, based in large part on Petitioner's lack of credibility, creates no conflict.

The Eleventh Circuit's affirmance of the District Court's award of a hiring preference, but not seniority, does not conflict with the cited cases because Petitioner was not comparable to the plaintiffs in the cited cases. Neither the award of a hiring preference, which was granted, nor an award of seniority,

which was not granted, was required; both are matters within the trial court's discretion.

ARGUMENT

I. The Eleventh Circuit Court's construction of the concepts of "substantially equivalent" employment and "reasonable diligence" in mitigating damages, as set forth in Ford Motor Co. v. E.E.O.C., 458 U.S. 219 (1982), does not conflict with decisions of other circuits.

Petitioner mischaracterizes the Eleventh Circuit as being "unconcerned with whether the Petitioner would have to obtain licensure in another state, additional and perhaps extended training, or dislodge her husband from his employment and move her family to another geographic area" (footnotes omitted). Petitioner's brief at 10. These mischaracterizations apparently are based upon alleged requirements for the specifically identified positions, additionally alluded to in footnotes 9-11

of Petitioner's brief. These alleged requirements were not presented by the Plaintiff nor found to exist by the trial court and are not part of the record in this case. Petitioner's whole conflict argument rests on the above stated mischaracterization of the Eleventh Circuit's holding.

Under Petitioner's erroneous premise, the Eleventh Circuit would go against: Florence Printing Co. v. NLRB, 376 F.2d 216 (4th Cir. 1967), by disallowing refusal of employment that "is dangerous, distasteful or essentially different from that for which [she] sought employment"; NLRB v. Madison Courier Inc., 472 F.2d 1307 (D. C. Cir. 1972), by disallowing rejection of "a position located over fifty miles from her place of residence"; Spagnuolo v. Whirlpool Corp., 717 F.2d

114 (4th Cir. 1983), by "requiring a discrimination victim to accept employment at an unreasonable distance. . . ."; and Hegler v. Board of Education of Bearden School District, 447 F.2d 1078 (8th Cir. 1971), by requiring a claimant to leave her community and move to another state. As can readily be seen from reading the transcript in this cause, the Eleventh Circuit's affirmance of the District Court made no such unreasonable demands of Petitioner. There is no conflict between the Eleventh Circuit's unpublished decision and those of the Fourth, Eighth, and D. C. Circuits. Rather, the Eleventh Circuit Court of Appeals applied this Court's standard in Ford, requiring

> reasonable diligence in finding other suitable employment. Although the unemployed or

> underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied.

458 U.S. at 231-232. The Court found that the petitioner in this cause refused substantially equivalent employment, and the court created no conflict with any other circuit courts in so finding.

Moreover, the court's finding that Petitioner did not exercise reasonable diligence involved Petitioner's credibility, an issue on which the trial court's findings are entitled to very great deference:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands <u>even greater deference</u> to the trial court's findings; for only the trial

> judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
>
> . . .
>
> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses [and therefore disbelieve at least one other witness], . . . that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985)(emphasis supplied).

II. The Eleventh Circuit Court's affirmance of the District Court's exercise of discretion in this cause in declining to grant Petitioner retroactive benefits, where Petitioner failed to mitigate her damages, does not constitute an abuse of discretion nor does it conflict with this Court's prior decisions.

Petitioner's brief correctly cites the settled federal law set forth in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), regarding the usual make-whole relief granted successful Title VII plaintiffs. However, the case at bar does not conflict with those cases because Petitioner is not the ordinary Title VII plaintiff. The University proved at trial that Petitioner did not want a job requiring full-time work at the time the University did not hire her and for several years thereafter.

Petitioner testified that she is now making as much money where she is working at the Office of Disability Determinations, where she has been since 1982, as she would have been making had she been hired at the University Health Center (R10-59) (Appendix 1a). There is nothing in the record to support any implication that Petitioner has not accrued the kind of other benefits at her present employment that she wants from the University. The period of her present employment is the only time Petitioner was entitled to such benefits because she worked full time to accrue them. Surely she was not entitled to accrue benefits during the period she was not entitled to salary. Petitioner wants to be treated as if she mitigated damages, which she did not. Under the circumstances the trial court

did not abuse its discretion in declining to grant Petitioner retroactive seniority, and the Eleventh Circuit created no conflict by affirming the trial court. In fact, the Third Circuit has held that an award of reinstatement following a failure to mitigate is not required and, even if given, it does not require an award of seniority as well. See Ellis v. Ringgold School Dist., 832 F.2d 27 (3rd Cir. 1987).

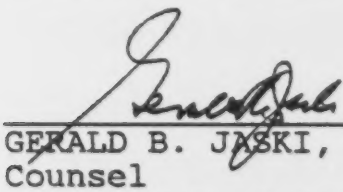
These matters are discretionary.

The Petition for Writ of Certiorari has identified no conflict between the decision below and any decision(s) of this Court or of any other circuit courts of appeals. It should be denied for that reason. Moreover, a just result was reached in this case.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied. In the event that the Court decides to grant certiorari, however, Respondent respectfully requests the opportunity for a full briefing on the merits of this cause.

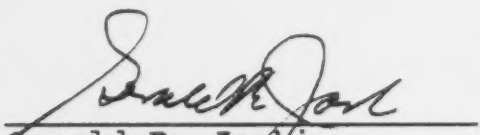
Respectfully submitted,



GERALD B. JASKI, General Counsel
Counsel of Record
LINDA C. SCHMIDT
Associate General Counsel
FLORIDA STATE UNIVERSITY
311 Hecht House
Tallahassee, Florida
(904) 644-4440

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jerry G. Traynham, Esquire, Patterson and Traynham, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32315, Attorney for Petitioner, by U. S. Mail this 16th day of December, 1988.



Gerald B. Jaski
Counsel of Record

APPENDIX

Q Now your salary in working at Disability Determinations since you went full time in February of 1982 is actually more than you would have earned at the health center if you had been hired when Doctors Heller and Latey were hired, correct?

A If I was hired as the senior physician in the health department it may have been the same. Both jobs are senior physician.

Q My question was whether your salary working at Disability Determinations was greater than it would have been from 1982, February 12, if you had been hired at the health center?

A No, it would have been the same.

Q So it wouldn't have been any less or more, it would have been the same?

A Yes.